No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG, *Appellants,* vs. JOHN P. MCLAUGHLIN, Collector of Internal Revenue, *Appellee.*	}

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

This is an appeal from a judgment of dismissal rendered by the United States District Court for the Northern District of California. A bill for injunction was filed by the appellants, Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg against John P. McLaughlin, Collector of Internal Revenue, for the First District of California, to restrain collection of the unpaid portion of a deficiency in an estate tax which had been determined by the Board of Tax Appeals against the Administrator of the Estate of Isadore Rosenberg, amounting to

$4787.60, together with interest. The appellee moved the court for an order dismissing the complaint for want of equity. The complaint and the motion were submitted on briefs. On May 25, 1932, the District Court granted defendant's motion to dismiss.

STATEMENT OF THE CASE.

The decedent, Isadore Rosenberg, a resident of California, died testate on May 23, 1923, leaving surviving him as beneficiaries of his estate his widow, Natalie Rosenberg, and three children, the appellants above-named. Under the will his estate passed one-half to the widow, and one-sixth to each of the children. The widow was appointed executrix of the estate. On December 31, 1923, she filed an estate tax return and paid the tax shown to be due on the return, namely, $7791.04. On March 24, 1924 she filed a claim for refund of estate taxes amounting to $5181.90 on the ground that the estate taxes in such amount had been erroneously collected. The estate of Isadore Rosenberg was distributed pursuant to the provisions of the will on July 10, 1924. The widow died on February 7, 1925. Under her will her estate passed in equal shares to the appellants to whom distribution was made in due course.

Edgar D. Rosenberg, one of the appellants herein, was appointed administrator of the estate of his father, Isadore Rosenberg, on April 6, 1925. This was for the purpose of collecting a refund of estate taxes in his father's estate, if such would be allowed by the Com-

missioner. In fact, on April 22, 1925, the Commissioner gave notice that a refund would be paid on the ground that the return of the gross estate of Isadore Rosenberg had included the widow's interest in the community property. On June 25, 1925, there was paid to him, as such administrator a refund of $4787.60. Under the terms of Isadore Rosenberg's will, the widow would have been entitled to one-half of this refund and the three children the remaining half, share and share alike. Under the mother's will the three children inherited share and share alike. As a result of the two wills the refund would, in fact, come to the appellants in equal shares.

On September 25, 1926, the Commissioner redetermined the tax due from the estate of Isadore Rosenberg and gave notice to Edgar D. Rosenberg of a deficiency estate tax amounting to $7839.07. Of this proposed deficiency, the sum of $4787.60 was on account of the refund which was alleged to have been paid erroneously, and the remainder $3051.47 was a deficiency arising out of other reasons. (Complaint par. 16, Rec. p. 10.) Following the notice of deficiency, the administrator, Edgar D. Rosenberg, appealed to the Board of Tax Appeals. The appeal was heard and on December 28, 1928, the Board entered a final decision in favor of the Commissioner for the amount of the proposed deficiency tax amounting to $7839.07. The decision of the Board of Tax Appeals is reported in

> *Appeal of Rosenberg,* 14 Bd. of Tax Appeals, 1340.

The deficiency so determined was assessed against Edgar D. Rosenberg, Administrator with the will annexed, of the Estate of Isadore Rosenberg, on July 27, 1929. He paid $3051.47, this amount representing the additional tax, leaving unpaid the balance of $4787.60, which represented the amount held by the Board to have been erroneously refunded by the Commissioner.

Upon the administrator's failure to pay the balance after notice and demand for payment, a warrant for distraint was issued and levy made upon certain real property located on Powell Street. Isadore Rosenberg, at the time of his death, owned a 3/8th interest in this property, which we will refer to as the "Powell Street property", described by metes and bounds in Paragraph IX of the complaint. (Rec. p. 5.) This 3/8ths interest was distributed, along with other property in Isadore Rosenberg's estate, on July 10, 1924, 3/16ths going to the widow, and 1/16th to each of the children. Following the death of the widow, Natalie Rosenberg, her 3/16th interest in this realty was distributed, 1/16th to each of the children. This was on July 27, 1925. Shortly prior to the distribution to them of their mother's interest, the three Rosenberg children, appellants herein, had purchased the outstanding undivided one-half interest of the Powell Street property which belonged to one Joseph Cahen, and on the same day sold a one-fourth undivided interest to one Langendorff. Thus, according to the allegations in the complaint, at the time the bill for injunction was filed, the appellants each owned a 1/16th

interest in the Powell Street property as heirs of their father and a 1/16th interest in the same property which came to them as heirs of their mother, but which came to her from the Estate of Isadore Rosenberg as his widow, the three together owning the amount originally owned by Isadore Rosenberg at the time of his death on May 31, 1923. In addition, they owned a one-fourth interest which represented the purchase from Joseph Cahen.

The Collector proposed to sell an interest in the Powell Street property on the theory that it was subject to a lien for estate taxes and thus to collect the unpaid balance of the deficiency in the estate taxes determined by the Board of Tax Appeals, amounting to $4787.60.

The question is, therefore, whether an injunction lay to restrain him from so proceeding.

In determining this question, it is necessary to consider what are the remedies which the government has in the collection of taxes generally. A general survey indicates that in times past the government has had two remedies: (1) where the original taxpayer has given away or distributed his property without payment of a tax due, or, in the case of a decedent, where property has been distributed to his heirs, then the government may proceed against the distributees in a proceeding in equity on the theory that the property constituted a trust fund for the creditors, of whom the government is one; and collection may be

made from the distributees, but only to the extent of the property in their hands. (2) By a claim of lien upon the property itself. Prior to the Revenue Act of 1926, a court proceeding was necessary to impose upon a transferee of assets the liability for taxes owed by the original taxpayer or by the estate of decedent. The old equitable remedy afforded by the creditors' bill enabled the government to collect taxes up to the extent of assets transferred to the individual defendant. However, the Revenue Act of 1926 enabled the Commissioner to assess taxes against a transferee. Section 280 of that Act provided for assessment of income taxes against the transferee of property of a taxpayer, and Section 316 (a) gave the same remedy as against the transferee of property of a decedent or a donor in respect to the tax imposed by the estate tax act or by any gift tax act.

As a consequence of the changes made in the 1926 Act, we contend that three remedies were available for the collection of the unpaid tax. *First,* by proceeding in equity against the distributees of the estate under the "trust fund" theory; *second,* by a lien upon the property of the original decedent, and *third,* by transferee proceedings brought by the Commissioner against the transferee of the estate. In the present case the second remedy was pursued.

The appellants herein take the position that Section 316 (a) made it mandatory upon the Commissioner to proceed against the transferees of a decedent's property, and that in the present case after

the determination of a deficiency against the administrator and the discovery of no assets in the estate, proceedings had to be brought under Section 316 (a) against the appellants as transferees. In other words, appellants contend that the transferee proceedings provided in Section 316 (a) of the Revenue Act of 1926 were exclusive in order to impose upon these appellants a liability for the estate taxes in question; and, secondly, that there was no lien against the property which was originally in their father's estate.

We shall discuss first, the exclusiveness of the remedy provided by Section 316 of the Revenue Act of 1926, and, secondly, the question whether there was a lien upon the Powell Street property for the estate taxes; third, whether the deficiency in question was a deficiency "in tax," secured by lien.

THE STATUTES INVOLVED.

Section 409 of the Revenue Act of 1921:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *"

Section 315 of the Revenue Acts of 1924 and 1926:

> "Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the

decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *''

Section 402 of the Revenue Act of 1921:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower; curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy; * * *''.

Section 613 of the Revenue Act of 1928:

"(a) Section 3186 of the Revised Statutes, as amended, is amended to read as follows:

" 'Sec. 3186. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the

United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

"(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector.' "

Section 3187 of the Revised Statutes as amended:

"If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, bank accounts and evidences of debt, of the person delinquent as aforesaid: * * *".

Section 3188 of the Revised Statutes:

"In such case of neglect or refusal, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for non-payment, and also of such further sum

as shall be sufficient for the fees, costs, and expenses of such levy."

Section 3224 of the Revised Statutes:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Section 316 (a) (Revenue Act of 1926):

"The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a decedent or donor, in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed by this title or by any prior estate tax Act or by any gift tax Act. * * *"

Section 308 (a) (Revenue Act of 1926):

"If the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the executor by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the executor may file a petition with the Board of Tax

Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 312 or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the executor, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

ARGUMENT.

I.

THE REVENUE ACT OF 1926 PROVIDED A NEW REMEDY IN ALLOWING PROCEEDINGS FOR THE ASSESSMENT OF TAXES TO BE BROUGHT AGAINST THE DISTRIBUTEES OF AN ESTATE, BUT SUCH REMEDY WAS CUMULATIVE, NOT EXCLUSIVE.

Section 316 of the Revenue Act of 1926, quoted above, enabled the Commissioner to assess against the transferee of property of a decedent estate taxes imposed by the Revenue Act of 1926, or by any prior estate tax act, or by any gift tax act. Appellants have failed to point out any provision in the 1926 Act which excludes the government from proceeding upon a lien, if there be a lien, under other statutory provi-

sions. They rely upon implications arising from the words

> "The amounts of the following liabilities *shall,* except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by this title."

It is stated that any liability of the appellants must be tested under this section for the word "shall" is mandatory (Appellant's Brief, pp. 26, 33, 57-58). Appellants urge that Section 316 was a new statutory provision which provided a new remedy for enforcing existing liability against the distributee of an estate, and that the Commissioner is obliged to follow the provisions of Section 316 combined with Section 308 of the Revenue Act of 1926, which provides the procedure for going before the Board of Tax Appeals (Appellant's Brief, pp. 33-34).

When it comes to the collection of taxes, a new remedy does not exclude the old remedy unless the statute expressly so provides.

> *Dollar Savings Bank v. United States,* 19 Wall. 227; 22 L. Ed. 80.

The argument that Section 316 is an exclusive remedy may be compared to a similar argument which has been made that Section 280 of the Revenue Act of 1926 was an exclusive remedy. Section 280 of the Revenue Act of 1926, in fact, follows the identical

language of Section 316 (a) except that it refers to "the liability at law or in equity of a transferee of property of a taxpayer," as to income tax; whereas Section 316 (a) refers to the liability of a transferee of property of a decedent or a donor in respect to estate taxes, or gift taxes. If Section 316 (a) is an exclusive remedy, and not a cumulative remedy, then, under the same reasoning, Section 280 would be held to be an exclusive remedy and not a cumulative remedy. Conversely, if Section 280 has been held to be not an exclusive remedy, then, under the same reasoning, Section 316 ought not to be held to be exclusive.

The argument that Section 280 was exclusive has been presented repeatedly, and almost uniformly the decision has been that the remedy is cumulative. See

> *U. S. v. Greenfield Tap & Die Corpn.*, 27 Fed. (2d) 933;
> *United States v. Garfunkel*, 52 Fed. (2d) 727;
> *United States v. Updike*, 32 Fed. (2d) 1;
> *Phillips v. Commissioner*, 282 U. S. 589;
> *United States v. Frommel & Bro.*, 50 Fed. (2d) 73.

Quite recently the question was presented to this court in the case of

> *John H. Leighton et al. v. United States*, 61 Fed. (2d) 530.

In that case the government sued the stockholders of the Leighton Corporation to whom assets had been distributed, without payment of income tax owed by

the corporation. The suit was brought against the stockholders, transferees, under the theory that the assets constituted a trust fund, for the payment of the taxes. Judgment was rendered against each stock holder to the extent of the distribution made to him. The appeal was grounded upon the contention that Section 280 of the Revenue Act of 1926 provided a new procedure for making liable for income taxes the transferees of the assets of a taxpayer; that this procedure was exclusive, and, by implication, took away the power of the District Court to entertain a creditors' bill, and that as the exclusive procedure brought by Section 280 had not been followed, the judgment was void. This court held that Section 280 was not an exclusive remedy but was cumulative and affirmed the judgment.

Following the analogy between Section 280 and Section 316 of the Revenue Act of 1926, the argument of the appellants falls to the ground. After the enactment of the Revenue Act of 1926, the United States had three remedies: *first,* to bring a suit in equity against the transferees of the estate on the theory that the property distributed to them constituted a trust fund for the payment of taxes due; *second,* by bringing transferee proceedings through the Commissioner against such transferees under the provisions of Section 316 (a), and, *third,* by pursuing a lien upon the property. In this case the United States elected to pursue the last remedy, to enforce a lien upon the property itself. Needless to say, if the Government

had a lien, then it was entitled to pursue it, even though it had remedies of a different kind.

II.

COLLECTION OF ESTATE TAXES MIGHT BE MADE BY PURSUING THE LIEN FOR TAXES WHICH ATTACHED UPON THE GROSS ESTATE OF THE DECEDENT AT THE TIME OF HIS DEATH.

(a) The lien was imposed by the Revenue Act of 1921.

The estate tax liability was imposed by the Revenue Act of 1921. Section 409 of that Act provides:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent."

In the case of

> *Page v. Skinner*, 298 Fed. 731, (C. C. A., 8th Cir.),

the decedent died on September 4, 1918. When the executrix filed the estate tax return on November 21, 1919, the Act of February 24, 1919, decreasing the schedule of rates, was in effect. The question was whether the later Act had repealed the prior Act without saving the tax, but, if the tax was saved, whether it was to be computed at the earlier or later rates. The case necessarily involved the time and character of the imposition of the tax. In holding that the tax was saved and accrued on the date of death the Court said:

> "The imposition took effect at the time of death and the tax became at once a lien on the property of the estate, enforceable by sale, if not paid, on proceedings in court. *N. Y. Trust Co. v. Eisner,* 256 U. S. 345; 65 L. Ed. 963. There was no personal liability. Shortly after the executrix made her return decedent's estate was closed and she brought this action in her personal right as sole beneficiary."

The appellants characterize the quoted passage as *obiter dictum.* If so it is dictum which has received unanimous approval and accord from other courts. In

> *United States v. Ayer,* 12 Fed. (2d) 194 (C. C. A. 1st Cir. at 199),

an action was brought against the executors of the estate of one Frederick Ayer. Ayer died on March 14, 1918. On September 8, 1919, his executors filed the return and paid the estate tax shown to be due on the return. On October 25, 1923, the Commissioner upon a review and audit determined that a further tax was due. Notice and demand was made for payment but the executors refused to pay. The United States sued for the additional tax. The Commissioner did not assess the tax within four years after the tax became due, and, in fact, never assessed it. The question was whether the United States might maintain an action against the executors either personally or in their representative capacity to recover the balance of the estate tax, the liability for which had accrued but the amount had not been assessed. In holding that the action lay, the court

commented upon the tax lien which the 1916 Revenue Act placed upon the gross estate, saying:

> "And it has been held that this lien for the tax attaches to the gross estate of the decedent from the time of his death, that is, simultaneously with the imposition of the tax. *Hertz v. Woodman,* 218 U. S. 205, 223; 54 L. Ed. 1001; *Page v. Skinner,* 298 Fed. 731 at 732."

Elsewhere in the opinion the court said:

> "We think the suit may be maintained and a personal judgment had against the executors for the amount of the tax due and that all the property of the estate that came into the hands of the executors and was not used to pay debts and expenses of administration, together with that transferred by the decedent in his lifetime in contemplation of death, upon *which a lien exists,* to secure payment of the tax, may be levied upon and sold to satisfy the judgment."

There are many later decisions which contain similar language.

Crooks v. Loose, 36 Fed. (2d) 571 at 573.

where the 1921 Revenue Act was involved.

O'Brien v. Sturgess, 39 Fed. (2d) 950, at 951;
Ewbank v. United States, 37 Fed. (2d) 383, at 385,

where the 1918 Revenue Act was in effect.

The appellants cite

United States v. Cruikshank, et al., 48 Fed. (2d) 352,

as standing for a different rule. In this case it appeared

that the decedent died on July 30, 1920. The executors filed the return on July 28, 1921, and paid a tax. On December 7, 1921, they filed an application under Section 407 of the 1921 Revenue Act for the Commissioner to make a final determination of tax liability and for discharge from their personal liability. The Commissioner did not determine a proposed deficiency assessment until April, 1925. During the interval, the executors had wound up the estate, paid the debts and turned over the net estate to the trustee named in the will. The United States sued for a judgment for the additional tax payable by the executors personally, and by the trustee out of the assets of the estate in his possession. This relief was granted. In referring to the lien the Court cited *Page v. Skinner,* supra, and also said:

> "If we lay to one side the asserted personal liability of the executors, the suit is solely to collect the tax through enforcement of the tax lien upon assets formerly belonging to the decedent. The trustee is a party defendant merely because these assets are now held by it. It is doubtless true that the restriction upon proceedings in court, which appears in section 308 (a), applies to a suit to collect a tax through enforcement of lien, as well as to other suits to collect taxes; in fact, section 314 (26 U. S. C. A. §1114), which authorizes proceedings in court of this character expressly declares that collection of a deficiency by this method shall be subject to the provisions of section 308 (a). But, as already pointed out, the requirements of section 308 (a) were fully complied with by the Commissioner. As I view the case, therefore, the claim that

the 1926 act forbade the bringing of this suit on July 22, 1926, is untenable."

Appellants cite *United States v. Cruikshank,* as authority for their contention that the United States could not rely on its lien for estate taxes, and that the Commissioner was obliged to bring transferee proceedings under Section 316 (a) and 308 of the 1926 Revenue Act. We are confident that the case stands for no such rule. In that case, as in the case at bar, the estate was wound up prior to the Commissioner's making of a deficiency assessment: there as here, the Commissioner gave the required notice of a proposed deficiency which enabled the executor or administrator to appeal to the Board of Tax Appeals. In neither case was notice given to the transferee of the estate. In that case, as in the present case, the Government sought to enforce its lien upon the assets in the hands of the transferee, without making the transferee personally liable. The difference is in the procedure for enforcing the lien. In *United States v. Cruikshank,* the remedy was by court action, in which the court ordered the assets to be sold to satisfy the lien; in the present case, the Collector sought to enforce the lien by distraint. The sole point on which the *Cruikshank* case supports appellants' contention is the court's view that in the suit in equity the transferee could not have been made personally liable for the tax to the extent of the property turned over to him—a view which is in direct opposition to the principles followed by this court in

Leighton v. United States, supra.

(b) Comparison of the specific lien for estate taxes and the general lien provided in Revised Statutes, Sec. 3186.

Upon the decedent's death on May 23, 1923, a lien was thus imposed upon his gross property and under the express language of the statute continued in effect for ten years unless the tax was "sooner paid in full". This lien is specifically an estate tax lien as distinguished from the general tax lien imposed by Section 3186 of the Revised Statutes, as amended, which is the tax lien applicable to all taxes. Section 3186 of the Revised Statutes, as amended (Section 613 of the Revenue Act of 1928), provides:

> "(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector, and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.
>
> "(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector. * * *"

Subsection (c) of Section 3186 of the Revised Statutes, further provides for the issuance by the collector of a certificate of release of lien upon the giv-

ing of a bond conditioned upon the payment of the assessment.

Subsection (f) provides that subsection (*c*) "shall apply to a lien in respect of any internal revenue tax, whether or not the lien is imposed by this section."

Section 3186 of the Revised Statutes, as amended, thus expressly recognizes the distinction which exists between the lien therein imposed and a lien imposed by other provisions of the law. The lien imposed by Section 3186 of the Revised Statutes, as amended, attaches only when the person liable to pay the taxes, neglects, or refuses to pay it after demand, and only from the time that the collector receives the assessment list. Thus, as conditions precedent to the attaching of a lien under Section 3186 of the Revised Statutes, as amended, there must be an assessment against the person liable to pay the tax, a demand for payment, and a neglect or refusal on his part to pay.

Now, comparing this section with the lien imposed by the estate tax provisions of the Revenue Act of 1921, and corresponding sections of other Revenue Acts, it will be seen that attachment of the tax lien requires none of these conditions, but automatically springs into existence upon the decedent's death (see *Page v. Skinner,* supra). Moreover the tax imposed by Section 3186 of the Revised Statutes, as amended, is upon property belonging to the person liable to pay the tax, whereas the lien imposed by the estate tax law is upon the gross estate of the decedent, which may

include property over which the executor, who is the person liable to pay the tax, has no custody or control. In short, the estate tax lien is a specific lien as distinguished from a general lien imposed by Section 3186 of the Revised Statutes, as amended. As a specific lien, it is peculiarly adapted to the collection of the estate tax. Under all the provisions of the federal statutes imposing an estate tax, the return is not required to be filed until a year after the decedent's death. If a lien for the estate tax attached only after assessment, notice and demand, and refusal to pay (as in the case of the lien imposed by Section 3186, R. S., as amended) it would be possible completely to defeat estate tax liability by the sale, mortgage or other disposition of the assets of the estate during the year elapsing between date of death and date of filing return.

Under Section 207 of the Revenue Act of 1916, the lien for an additional estate tax found to be due was expressly limited to that part of the gross estate which had not been sold to a bona fide purchaser for a fair consideration, in money or money's worth. A similar limitation was carried into Section 313 (c) of the 1926 Act in respect of a lien for a deficiency, saving that where the property was sold to a bona fide purchaser for value, the lien was shifted to the consideration received from such purchaser. This limitation in itself shows that otherwise property in the hands of a bona fide purchaser would have been regarded as subject to the estate tax lien. The extinction of the lien by

express statutory declaration in favor of a bona fide purchaser would have been unnecessary had the statute contemplated that the estate tax lien was subject to the requirements imposed by Section 3186, R. S., as amended.

In this connection let us note that while usually it is not necessary to resort to a provision for a general lien where a specific lien exists, nevertheless, the provision for a general lien can be resorted to.

> *Blacklock v. U. S.*, 208 U. S. 75, at p. 85; 52 L. Ed. 396; 16 Opns. Atty. Gen. 634, at p. 636.

(c) The method of procedure by distraint.

If a lien attaches, however, the method of procedure by distraint is the same, whether it be the general lien imposed by Section 3186, R. S., as amended, or by the estate tax provisions. This results from the operation of Section 1100 of the 1926 Act, and corresponding sections of the prior acts, which extend to and make a part of the 1926 Act the administrative provisions of earlier acts so far as applicable.

The method of procedure by distraint for the enforcement of the lien is prescribed by Sections 3187 and 3188 of the Revised Statutes, which are quoted above. Under these provisions the property which may be seized in the enforcement of a lien is either the property which belongs to the person liable to pay the tax, or the property upon which the lien exists. These provisions do not authorize the seizure of property in the enforcement of the lien where the prop-

erty at no time during the subsistence of the lien belonged to the person liable to pay the tax.

Mansfield v. Excelsior Refining Co., 133 U. S. 326; 34 L. Ed. 162.

But they do authorize such procedure where the property belonged to the delinquent at the time the lien attached, notwithstanding its sale thereafter prior to the seizure. Such in effect was the decision in the case of

Hartman v. Bean, 99 U. S. 393; 25 L. Ed. 455.

In this case there was a lien for tax on distilled spirits for the payment of which the distiller was liable. The lien was enforced by seizure of the spirits subsequent to the sale of the distillery. It appeared that the distilled spirits had been removed from the distillery without payment of tax for storage in a bonded warehouse where they were subsequently sold. Under the provisions of Section 3251 of the Revised Statutes, the tax on distilled spirits was required to be paid by the distiller, owner or person having possession thereof before removal from the distillery bonded warehouse, and was made a lien on the spirits. Subsequent to the sale of the spirits by the distiller, and while they remained in the warehouse, a deficiency assessment was made against the distiller based on the difference between the quantity of spirits produced and the quantity reported. Section 3309 of the Revised Statutes made the assessment a lien on all distilled spirits on the distillery premises. Upon the distiller's failure to pay the tax, the spirits in question, though no longer

the property of the distiller, were seized by the collector and sold to satisfy the assessment. The purchaser then instituted an action against the collector upon the ground that the spirits were not subject to a lien for the tax nor to seizure under the warrant of distraint. The Supreme Court sustained the validity of the lien and of the seizure and sale by the collector.

In the case of

> *Mansfield v. Excelsior Refining Co.,* 135 U. S. 326; 34 L. Ed. 162,

an action in ejectment was brought. Certain premises had been leased for distillery purposes, the owner agreeing that the premises should be liable to the lien imposed by Section 3251 of the Revised Statutes for the taxes on distilled spirits produced therein, and for which tax the distiller was liable. Upon the failure of the distiller to pay the tax assessed, the collector seized and sold the premises. Since the distiller had only a lease-hold interest in the premises, it was held that the fee did not pass, notwithstanding the lien thereon. The court pointed out that while the lien might have been enforced against the owner of the fee by a suit in equity, the distraint proceedings and the sale of the premises would affect only the interest of the person liable to pay the tax, in this case the lease-hold interest of the distiller.

In the case of

> *Blacklock v. United States,* 208 U. S. 75; 52 L. Ed. 396,

the court distinguished the *Mansfield* case. In the

Blacklock case certain distillery premises owned by the distiller were subject to the lien imposed by Section 3251 of the Revised Statutes, for the unpaid tax on distilled spirits. A mortgage was executed by the distiller subsequent to the accrual of the tax lien upon the spirits. The court held that the sale of the property under distraint proceedings passed the title to the purchaser free from the mortgage lien. It was stated that "the Government had the right, by distraint, to sell such interest in the lands as the delinquent distiller owned at the time its lien attached," and that "the interest which the distiller in this case had when the Government's lien attached passed by the sale of the collector".

The principle to be deduced from the decisions in these cases is that a tax lien on property may be enforced by seizure and sale under a warrant of distraint where, at the time the lien attached, the property belonged to the person liable to pay the tax.

These cases are also authority for the rule that the procedure for the enforcement of a tax lien other than a general lien imposed by Section 3186 of the Revised Statutes is the same procedure as that prescribed for the enforcement of the general lien. Therefore, such procedure is applicable to the lien imposed by the estate tax provisions. For estate tax purposes, the executor or administrator is the person liable to pay the tax. Since the estate tax lien attaches immediately upon the death of a decedent, the property at that time may be regarded as belonging to the taxpayer,

i. e. the administrator or executor, and therefore the property which is subject to seizure and sale under distraint proceedings is that property of the decedent which, after his death, constituted the assets of his estate.

III.

THE TAX SOUGHT TO BE RECOVERED IN THE CASE AT BAR BY LEVY UPON THE PROPERTY WAS A DEFICIENCY DETERMINED BY THE BOARD OF TAX APPEALS.

The appellants contend that part of the deficiency determined by the Board of Tax Appeals represented the amount erroneously refunded, $4748.60; that this deficiency is not a tax, and therefore there is no lien to protect it which is enforceable by the procedure of seizure and sale under warrant of distraint. In support of this contention, appellants cite authorities to the effect that when a tax is once paid the tax liability is satisfied and the lien discharged, and that where an amount so paid is subsequently refunded by the Commissioner erroneously, such refund may be recovered from the distributee of the refund by suit in court for money had and received, but not as a tax. Appellants cite the cases of

> *Kelly v. United States,* 30 Fed. (2d) 193;
> *Talcott v. United States,* 23 Fed. (2d) 897.

In the *Kelly* case, supra, decided by this court, it was held that the proper remedy for recovery by the United States of taxes erroneously refunded to a tax-

payer was by action at law for money had and received. In reaching this conclusion the court said:

> "It seems clear to us that the suit cannot be maintained on the theory on which it was commenced and prosecuted to final decree in the court below. When once paid a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.' Cooley on Taxation (3d Ed.) From this view, we know of no dissent. Thus in *Mason v. City of Chicago,* 48 Ill. 420, and *Hudson v. People,* 188 Ill. 103; 58 N. E. 964, it was held that the payment of a special assessment discharged the lien and that the lien could not be reinstated by a mere refund of the amount paid."

In the *Kelly* case, however, the amount of the erroneous refund had not been determined by a deficiency assessment. It is this difference which distinguishes those cases from the case at bar. In fact, this court has already distinguished the *Kelly* case upon this ground in

Levy v. Commissioner, 48 Fed. (2d) 725.

The facts in the *Levy* case up to a certain point are the same as in the instant case. The executor included the wife's share of the community property in the estate tax return, and paid the tax. Thereafter they filed a claim for refund. A refund was paid on the ground that the wife's share should have been ex-

cluded. Thereafter the Commissioner proposed a deficiency assessment by including the wife's share of the community property. The case went to the Board of Tax Appeals and thence to this court. It was argued in behalf of the executors that after they had paid the tax shown on the return and a refund had been made, then whether the refund was erroneous or not, no part of the refund could be considered as a "tax deficiency". The executors relied on the case of *United States v. Kelly*, supra, as do the appellants in the case at bar. The Commissioner relied upon the general principle that the Commissioner in reviewing, reconsidering and redetermining tax liability, may properly increase a deficiency by including the amount of erroneous abatements and refunds and upon the practice of the Board of Tax Appeals in so determining deficiencies.

This court held that the amount so erroneously refunded was properly included in a deficiency assessment, and distinguishing the *Kelly* case, said:

> "In *Kelly v. United States*, (C. C. A.) 30 F. (2d) 193, cited by the petitioners, the executrix paid the estate tax on the entire community estate, and a refund was made by the Commissioner because of a supposed error in including the entire community estate as a part of the net estate for tax purposes. Up to this point the two cases are analogous, but there the analogy ends. In the *Kelly* case the Commissioner did not redetermine the amount of the tax or deficiency, but contented himself by simply making a formal demand on the appellee

to pay the amount of the refund. Suit was thereupon instituted by the United States to recover the amount of the refund as a tax and to foreclose the tax lien. Under these facts, we held that the payment of the tax discharged the tax lien, that the refund of the tax did not restore it, and that the sole remedy of the government was an action at law against the executrix for money had and received. This was the only question determined. * * * In that case the government had an unquestionable right to recover the unauthorized refund in an action for money had and received, and whether the Commissioner had a concurrent right to redetermine a deficiency was not directly involved. * * *"

A similar decision appears in

Austin Co. v. Commissioner, 35 Fed. (2d) 910 (C. C. A. 6th Cir.).

No other conclusion is possible when one considers the statutory definition of a "deficiency," appearing in Section 307 of the Revenue Act of 1926, cited by the Court in the *Levy* case.

"The amount by which the tax imposed by this title exceeds the amount shown as the tax by the executor upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and *decreased by the amounts previously abated, refunded, or otherwise repaid* in respect of such tax; * * *". (Italics ours.)

Section 313 (b) provides the method whereby the executor may be discharged from personal liability for any deciency in tax, and subdivision (c) provides that "the provisions of subdivision (b) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due".

We conclude, therefore, that there is no basis for the contention in the case at bar that the deficiency determined by the Board of Tax Appeals, in so far as it related to the refund of $4787.60, was not a deficiency in tax.

IV.

A LIEN ATTACHED TO THE ESTATE PROPERTY FOR THE DEFICIENCY IN TAX, INCLUDING THE DEFICIENCY DETERMINED BY THE BOARD OF TAX APPEALS.

The estate tax lien imposed by Section 409 of the Revenue Act of 1921 attached upon the death of the decedent, Isadore Rosenberg. The language used in creating the lien is that

> "unless the tax is sooner paid in full it shall be a lien for ten years upon the gross estate of the decedent."

Appellants construe "sooner" to refer to the date when payment of the tax is due, and say that the whole provision means that the tax only becomes a lien on the gross estate at the time it becomes due and payable (i. e. one year after death) (Appellant's Brief, p. 10). Where the tax shown upon the estate tax re-

turn is paid before the "due" date, we presume that appellants would say no lien ever came into existence. We submit that this is strained. Suppose the case of an executor failing to return the true value of the estate, but nevertheless paying in advance of the "due" date the tax shown to be due on the erroneous or false return? Appellants' contention would require the decision that no lien ever came into existence under the 1921 Act, and that a subsequent assessment by the Commissioner would or would not be protected by lien, depending on the provisions of a later Act of Congress and whether the estate was distributed at the time of the deficiency assessment.

No authorities are cited by the appellants for this construction. The authority cited for holding that the due date for payment is the date of accrual of the estate tax is

> *Wilmington Trust Co. v. United States,* 28 Fed. (2d) 205; 207,
> (Appellants' Brief, page 23).

The court in the *Wilmington Trust Co.* case erred in its construction of the statute.

See

> *Hannah v. United States,* 68 Ct. Claims 45 (certiorari denied 280 U. S. 612),

and also

> *Burrows v. United States,* 56 Fed. (2d) 465, (Court of Claims),

where the authorities are fully cited.

A more natural meaning was given to Section 409 of the 1921 Act by taking "sooner" to refer to the lapse of the ten-year period referred to in Section 409; that is, that "the tax shall be a lien for ten years upon the gross estate of the decedent unless it is sooner (before the lapse of the ten-year period) paid *in full*".

This is the meaning followed by the court in

United States v. Ayer, 12 Fed. (2d) 194 at 199.

By the provision for a ten-year lien Congress must have intended to protect the estate taxes due the United States. Certainly the construction placed on Section 409 in *United States v. Ayer,* supra, would carry out the purpose of Congress better than the construction which appellants ask.

V.

THE RIGHT TO INJUNCTIVE RELIEF.

We shall not make elaborate argument upon this point. The appellants' bill for equitable relief is grounded upon the theory that the admitted facts showed that the Collector was attempting to enforce by warrant of distraint an alleged lien, which was completely void, for an alleged tax, which was not a tax.

We are inclined to agree with the views of the District Court in

Long v. Rasmussen, Collector, 281 Fed. 236.

cited in Appellants' Brief, at page 46.

We think it is true that section 3224 of the Revised Statutes prohibiting restraint of the assessment and collection of a tax relates to the protection of a tax and does not protect a collector's unauthorized trespass upon a plaintiff's property in which no tax is involved. On the other hand, if the facts alleged show that the Collector was seeking to enforce a statutory lien for a deficiency in tax properly assessed, appellants have not made out a case to support their prayer for injunctive relief. Section 3224 of the Revised Statutes, quoted at page 10 above, blocks them.

VI.

COMMENT ON MINOR POINTS.

There are other points touched upon in appellants' brief upon which we do not think extended argument is necessary. The appellants complain that they did not have opportunity to litigate the merits of the tax deficiency. The same complaint might be made in innumerable cases, where the executor or administrator appears and conducts the litigation in behalf of the heirs. The answer is that he is the person appointed by law for such purpose, and that the law gives the beneficiary a remedy in the case of a faithless administrator. We cannot agree that the beneficiaries or heirs should have the right to litigate the merits of a tax after the administrator has litigated it.

Before concluding our brief we would like to point out an apparent discrepancy which was not argued in

the lower court, and which appellants have not pressed, but which we think ought to be clarified. On referring to page 4 above, the Court will observe that the interest owned by Isadore Rosenberg in the Powell Street property was an undivided 3/8ths, which is now owned by the appellants in equal shares. By purchase, the appellants acquired an additional one-fourth interest. Each is now the owner of an undivided 10/48ths interest, of which only 6/48ths was originally in the estate of Isadore Rosenberg. Obviously, the lien for deficiency in tax does not apply to more than the original 3/8ths (or 18/48ths) owned by Isadore Rosenberg. The notice given each of the appellants by the Collector refers to a 10/48ths interest owned by each (Rec. pp. 22-23). We do not think that the notice can fairly be said to evince an intention to sell more than the original 3/8ths interest in Isadore Rosenberg's estate. The bill of complaint did not ask the court to protect the appellants as to the 4/48ths interest which each had acquired by purchase, nor did the Assignment of Errors assign error for a failure so to do. The appellant's brief makes some reference to this discrepancy (Appellants' Brief, p. 7).

Undoubtedly, the lower court would have protected the appellants as to the interest which they acquired by purchase, had appellants asked it, and had the pleadings necessitated it. In our opinion, the pleadings do not show an intention on the part of the Collector to levy upon more than the interest owned by

the decedent. He can only transfer to a prospective purchaser the property subject to the lien. We direct attention to the situation so that the court may give appellants protection if it is deemed to be needed.

Respectfully submitted,

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